DOCKET FILE COPY ORIGINAL

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



| | | |
|---|---|---|
| In the Matter of | ) | |
| Promotion of Competitive Networks in Local Telecommunications | ) | WT Docket No. 99-217 |
| Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services | ) | |
| Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes And Assessments | ) | |
| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |

# JOINT COMMENTS OF THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, AND MONTGOMERY COUNTY, MARYLAND

August 27, 1999

## TABLE OF CONTENTS

## SUMMARY

The proposed requirement that conduits and rights-of-way inside buildings be made available to competing telecommunications providers is unnecessary, inappropriate, and unconstitutional. Any proposal that requires such forced access to private property for telecommunications companies would impact local governments, as well as commercial building owners, since local governments also own, operate, and lease buildings. Thus, we generally support the comments filed by the Real Access Alliance on behalf of private building owners and managers. Some such buildings and property, however, are unique, such as parks, public housing, and emergency facilities. These facilities that have their own economics and face unique constraints. Thus, a universal forced access rule by the Commission would disrupt these programs even more than would be the case in private industry.

The Commission has neither the jurisdiction nor the authority over local governments to impose a nondiscriminatory access requirement. The Communications Act gives the Commission neither express nor ancillary jurisdiction over building owners who do not engage in communications by wire or radio. Nor does the Communications Act give the Commission jurisdiction over such building owners' property merely because such real property *could* be used to locate communications facilities. Further, the proposed approach would impermissibly require the Commission to manipulate the scope of property rights created under state law.

The Commission's proposed forced access requirement is unconstitutional. Any requirement by the Commission that property owners grant physical access to their properties would constitute a taking under the Fifth Amendment. A rule that mandated forced access would constitute a *per se* taking. Moreover, a nondiscriminatory access rule would constitute

a regulatory taking since the rule would make it difficult, if not impossible, for building owners (including local governments) to recover their investments.

Even if the Commission had jurisdiction over building owners, and even if the Commission could require nondiscriminatory access under the Fifth Amendment, the Commission does not have the express authority required to take private property. Without an express statutory authorization, the Commission cannot effect a taking.

Mandating that local governments provide nondiscriminatory access to their property by telecommunications providers would create great practical problems and impose enormous potential liability on local governments. Local governments, as building owners and managers, have many responsibilities that can only be met if they can control access to their properties, including compliance with safety codes; ensuring the security of tenants, residents and visitors; coordination among tenants and service providers; and managing limited physical space. For the Commission to limit this control would increase the local governments' exposure to liability and would adversely affect public safety.

Moreover, even if the Commission had the authority to mandate forced access to telecommunications providers, there is no basis for doing so. The current real estate and telecommunications markets indicate that there are practical reasons not to take such an approach. Building restrictions do not play a major role in preventing telecommunications competitors from reaching tenants. Rather, normal technical and financial constraints on the fast-growing competitive telecommunications companies are a greater obstacle to the industry's growth than lack of access to buildings.

Imposing a nondiscrimination requirement on building owners in the name of extending service to tenants would be inequitable, because CLECs are free to discriminate against tenants. There is no reason to hold building owners – including local governments – to a different standard than telecommunications providers themselves.

The Commission lacks authority to extend its video receive antenna rules to telecommunication antennas. The Telecommunications Act of 1996 strictly distinguishes these two types of antennas, and preserves local authority over the latter. Moreover, the Act generally prohibits a preemptive reading unless preemption is explicitly required. Thus, the NPRM cannot pretend to rely on an implied authority to preempt under the Act – certainly not in the teeth of the contrary provision of § 704.

The Commission must address other issues in a way consistent with the property rights of building owners. For example, any Commission rule that required LECs to provide house and riser cable as unbundled network elements ("UNEs") cannot be construed as creating a right of physical access. Similarly, the Commission's definition of the demarcation point should preserve the flexibility of the current system and the property rights of building owners.

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | |
|---|---|
| In the Matter of | |
| Promotion of Competitive Networks in Local Telecommunications | WT Docket No. 99-217 |
| Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services | |
| Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes And Assessments | |
| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | CC Docket No. 96-98 |

# JOINT COMMENTS OF THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, AND MONTGOMERY COUNTY, MARYLAND

August 27, 1999

## I. INTRODUCTION

The Commission's Notice of Proposed Rulemaking ("NPRM") in this docket proposes to require all utilities governed by Section 224 to make conduits and rights-of-way inside buildings available to competing telecommunications providers, as a means of allowing such providers to extend their facilities to subscriber premises located inside buildings.[1] This proposal would impact local governments, as well as commercial building owners, since local governments also own, operate, and lease buildings. Local governments own or control a wide variety of buildings and property – not only properties similar to those owned by commercial parties, but also unique sorts of private property, such as parks, subsidized housing, and police and fire training facilities. If the Commission were to stretch Section 224 beyond the limits of its intended meaning and require building owners to provide access to telecommunications carriers, it would force access to such local government property as well.

Mandating forced access to private property for telecommunications companies is unnecessary, inappropriate, and unconstitutional. Moreover, even if the Commission had the authority to mandate forced access to telecommunications providers, which it does not, there is no basis for doing so. In fact, an examination of the state of the current real estate and telecommunications markets indicates that there are practical reasons not to take such an

[1] The commenters expect to file separate comments at a later date in response to the related Notice of Inquiry.

approach.[2] As the Real Access Alliance indicates in its filing, the manner in which the current real estate market operates is not inhibiting access to buildings by telecommunications providers. Building restrictions do not play a major role in preventing telecommunications competitors from reaching tenants. Rather, normal technical and financial constraints on the fast-growing competitive telecommunications companies are a greater obstacle to the industry's growth than lack of access to buildings. Current real property law governing access to buildings by utilities and telecommunications companies is flexible. Its adaptation to telecommunications competition is well under way. Where possible, building owners are already renegotiating their legal relationships with the incumbent providers to allow for competition.

Should the Commission adopt a forced access approach, local governments will be affected by the Commission's proposals in many of the same ways as private building owners and managers. For this reason, we generally support the comments filed by the Real Access Alliance on behalf of private building owners and managers.

## II. LOCAL GOVERNMENT PROPERTY HAS UNIQUE FEATURES THAT MILITATE AGAINST FORCED ACCESS.

Local governments, in their capacity as building owners, occupy a somewhat unique position in the real estate market. For example, in addition to the types of buildings typically

---

[2] *See* Joint Comments of the Building Owners and Managers Association International; the Institute of Real Estate Management; the International Council of Shopping Centers; the Manufactured Housing Institute; National Apartment Association; the National Association of Home Builders; the National Association of Industrial and Office Properties; the National Association of Real Estate Investment Trusts; the National Association of Realtors; the

owned and operated privately, local communities also own parks, public housing, and emergency facilities. Other situations arise from local governments' interest in promoting economic development in their communities. For example, Montgomery County, in partnership with the state of Maryland, has set up an "incubator" building for startup technology companies along the I-270 corridor. Here, small offices sharing central office services are available for use by startup companies until they grow large enough to lease their own space. Other local instances include the Silver Spring redevelopment area and the Rockville Town Center retail/office complex adjoining the County's Executive Office Building. These sorts of properties have their own economics and face unique constraints. As a result, a universal forced access rule by the Commission would disrupt these programs even more than would be the case in private industry.

While local governments can and do permit the placement of telecommunications facilities in some of their properties (and in fact often encourage such placement by telecommunications providers), local governments do so only in areas where such placement can be made with minimal adverse impact to citizens. Local governments must always balance the impact of such use against other community concerns, such as the intrusiveness of a facility into a particular neighborhood.[3] An approach that would require local governments to provide access to these areas, in all circumstances, would prevent them from adequately considering the impact on their communities. For example, a historic building may at some time in its history have been wired for telephones, or electric lighting; but it does not follow that its

---

National Multi Housing Council; and the National Realty Committee/The Real Estate Roundtable, Docket No. 99-217, filed August 27, 1999 ("Real Access Alliance Comments").

historic character would be unaffected by the incursion of an unlimited number of additional telecommunications companies, each with its own wiring and facilities. (Indeed, such a structure might be physically unable to withstand the installation of such additional systems, at least without enormous expense.)

In addition, forced access could increase the capital costs of construction to local governments even where competition is highly unlikely. For example, subsidized housing is among the types of buildings built and managed by local governments. If such buildings must be designed to accommodate potential use by any number of telecommunications providers, construction costs are likely to increase. Yet the chance that providers will actually rush to serve such a building is vanishingly small.

For these reasons, local governments, as building owners and managers, would be adversely affected by the approach contemplated by the NPRM.

## III. THE COMMISSION HAS NO AUTHORITY TO IMPOSE A NONDISCRIMINATORY ACCESS REQUIREMENT ON LOCAL GOVERNMENTS.

The Commission's Notice of Proposed Rulemaking contemplates the intrusive and unlawful imposition of a nondiscriminatory access requirement on building owners as one possible solution to what is essentially a nonexistent problem. In addition to the practical problems created by such an approach, the Communications Act confers upon the Commission neither the jurisdiction nor the authority over local governments to impose it.

---

[3] For example, a monopole proposed by a telecommunications carrier may be visible to nearby residents where existing lower-lying facilities are not.

### A. The Communications Act Gives the Commission No Jurisdiction Over Building Owners or their Property.

Section 2(a) of the Communications Act states that the Act applies "to all interstate and foreign communications by wire or radio . . . and to all persons engaged within the United States in such communication . . . ." 47 U.S.C. § 152(a). But local governments, as building owners, are not engaged in such communications, and do not fall within the Commission's jurisdiction.[4] Furthermore, the Commission lacks jurisdiction over real property ownership in general, even when the property is used in a regulated activity. *See Regents v. Carroll*, 338 U.S. 586 (1950); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994). Nor does the Commission have jurisdiction over real property merely because that property might have an incidental effect on a regulated activity. *See e.g., Illinois Citizens Committee for Broadcasting v. FCC,* 467 F.2d 1397 (7th Cir. 1972) (FCC had no jurisdiction over construction of Sears Tower despite possible effect on broadcast signals). Consequently, the Commission has no power to regulate building owners except insofar as the building owner is itself a telecommunications provider (for example, where the building is a central office belonging to a LEC and used in the conduct of a telecommunications business). The mere ownership of real property on which telecommunications facilities *could* be located does not bring an entity within the Commission's jurisdiction.

---

[4] To the extent that local governments, acting *in other respects* than as building owners, may engage in communications within their own boundaries, this represents intrastate rather than interstate communications. Section 2(b) makes clear that the Commission does not have jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carriers." *See* 47 U.S.C. § 152(b).

### B. The Commission's exercise of ancillary jurisdiction extends only to entities that are engaged in activities subject to the Communications Act.

While the Commission's ancillary jurisdiction expands the Commission's jurisdiction beyond the scope of its express jurisdiction stated in the Act, there are boundaries to this jurisdiction. The Supreme Court has held that the Commission may exercise authority that is "reasonably ancillary to the effective performance of the Commission's various responsibilities." *U.S. v. Southwestern Cable Co.*, 392 U.2. 157, 178 (1968). However, the Commission may not regulate activities that are unrelated to the communications industry. *See, e.g., GTE Service Corp. v. FCC,* 474 F.2d 724, 735-36 (2d Cir. 1972) (FCC cannot regulate data processing services provided by regulated entities).

Even in the case of a matter that does affect the communications industry, the Commission's ancillary jurisdiction does not extend to building owners. *See, e.g., Illinois Citizens Committee,* 467 F.2d at 1400 (noting restrictions on scope of *Southwestern Cable*). The purpose of ancillary jurisdiction is to ensure that the Commission can fill in gaps in its authority over entities and activities it is empowered to regulate, *see, e.g., Lincoln Tel. and Tel. Co. v. FCC,* 659 F.2d 1092 (D.C. Cir. 1981) (finding ancillary jurisdiction to impose upon *telecommunications carriers* interim billing method for interconnection charges); *New England Tel. and Tel. Co., et al. v. FCC,* 826 F.2d 1101 (D.C.Cir. 1987) (finding ancillary jurisdiction to order *telecommunications carriers* to reduce telephone rates). It is not to expand that authority to include otherwise unregulated entities or activities. Accordingly, the Commission's ancillary jurisdiction does not extend to building owners, including local governments.

### C. The Scope of Existing Rights Granted by Property Owners to Utilities Is Governed by State Property Law and the Commission Has no Power to Expand that Scope.

The Commission has no power to grant, expand, or determine the scope of property rights in buildings. "[P]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (internal quotation omitted). "[P]roperty rights have traditionally been, and to a large degree are still, defined in substantial part by state law." *Columbia Gas Transmission Corporation v. An Exclusive Natural Gas Storage Easement In The Clinton Subterranean Geological Formation Beneath A 264.12 Acre Parcel In Plain Township, Wayne County, Ohio*, 962 F.2d 1192, 1198 (6th Cir. 1992) citing 36 C.J.S. Federal Courts § 189(5) (1960) ("As a general rule, legal interests and rights in property are created and determined by state law. . .).

Even the Commission has recognized that "[t]he scope of a utility's ownership or control of an easement or right-of-way is a matter of state law."[5] In its discussion of Section 224(f)(1), the Commission notes that it "cannot structure general access requirements where the resolution of conflicting claims as to a utility's control or ownership depends upon variables that cannot now be ascertained. We reiterate that the access obligations of section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access." *Id.*

---

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 at ¶ 1179 (1996), citing S. Rep. No. 580, 95th Cong., 1st Sess. 16 (1977).

If the Commission adopted a rule automatically extending every access right held by a utility so as to allow every CLEC and cable operator to occupy a building owner's property to install its facilities, this would amount to a reduction by the Commission of the scope of the property rights of the property owner, and a corresponding award of property rights to a telecommunications provider. Yet the Commission cannot create property rights, nor can it decide what they encompass. Such matters are purely questions of state law.[6] Consequently, the Commission cannot unilaterally grant CLECs the right to use or occupy existing easements or access rights inside buildings.

## IV. ANY REQUIREMENT BY THE COMMISSION THAT PROPERTY OWNERS GRANT PHYSICAL ACCESS TO THEIR PROPERTIES WOULD CONSTITUTE A TAKING UNDER THE FIFTH AMENDMENT.

### A. A Nondiscriminatory Access Rule Would Constitute a *Per Se* Taking

Requiring a property owner to allow a third party to occupy space in a building and to attach wires to the building crosses the clear line between permissible regulation and impermissible takings.[7] The Supreme Court has said that where the "character of the governmental action . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

---

[6] For a more detailed discussion of Section 224 and its failure to authorize the Commission to expand the scope of existing easements or other arrangements between property owners and service providers, *see* Real Access Alliance Comments, Exhibit F.

[7] For a full exposition of the Fifth Amendment issues raised by the NPRM, *see* Real Access Alliance Comments, Exhibit E.

*Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

The nondiscriminatory access requirement contemplated by the Commission in its NPRM is not legally distinguishable from *Loretto*. In fact, any forced physical access proposal, including a nondiscriminatory access requirement, would fall squarely within the *per se* takings rule articulated by the Supreme Court in *Loretto*.[8] For example, in the most recent decision in this area, *Gulf Power Co. v U.S.*, 998 F. Supp. 1386 (N.D. Fla. 1998), the court ruled that the nondiscriminatory access provision of Section 224 of the Communications Act constitutes a taking. The *Gulf Power* court relied directly on *Loretto* in reaching this conclusion.[9]

It may be suggested that an owner's consent to the physical presence of an ILEC or a tenant on a property does not change this analysis, based upon the Supreme Court's decision in *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). However, such reliance would be misplaced. The Court in *Florida Power* found that the government had authority to regulate the rates charged by the property owner because the property owner had opened his space to tenants. However, the power to regulate rents does not give the government the power to require the property owner to lease additional space to a tenant or a third party without

---

[8] For an more extensive analysis of the implications of *Loretto* and subsequent Supreme Court "takings" cases *see* Real Alliance Comments at 37-39 and Exhibit E.

[9] Although the *Gulf Power* court upheld the statute, it did so only because the statute also provided a mechanism for establishing compensation by directing the Commission to adopt rules regulating pole attachment rates. However, in the instant case, Congress has not given the Commission authority to compensate building owners or regulate terms of access. Consequently, *Gulf Power* would require a different result for the rule contemplated by the NPRM.

violating the takings clause. Nor does *Florida Power* say that a property owner can be required to lease space to any company that requests access to the premises.[10]

Even if the logic of *Florida Power* applied to this case, there is a crucial distinction. *Florida Power* distinguished *Loretto* on the ground that the New York cable statute did not give Mrs. Loretto a choice: she was required to acquiesce to the presence of the physical intrusion. Florida Power, on the other hand, could have chosen not to lease its poles. But building owners, including local government, do not have a practical choice about whether to allow the ILECs onto their properties. Their buildings would have been unusable if they had not allowed the monopoly telephone providers onto their premises. Thus, building owners generally have been and continue to be required as a practical matter to acquiesce to the presence of the ILEC.

### B. A Nondiscriminatory Access Rule Would Constitute a Regulatory Taking.

The nondiscriminatory access proposal would in effect compel building owners – including local governments – to bear the cost of the expansion of facilities-based competition.[11] Nondiscriminatory access would make it difficult, if not impossible for building owners to recover investments they have made in telecommunications infrastructure. Such a proposal would also destroy the existing market for rooftop antenna site and building access rights. This market and the revenues derived from it, while still small in comparison to the

---

[10] *Yee v. Escondido,* 503 U.S. 519 (1992), is inapposite for the same reason. That case regulated the relationship between mobile home park owners and their existing tenants. It does not, however, stand for the proposition that a mobile home park owner can be required to rent additional land to any mobile home owner, merely because it has chosen to rent one mobile home pad to one person.

rental market and revenues, is well-established. Building owners now have a reasonable investment-backed expectation of revenue from those sources. Those revenues vary from building to building, but they can be substantial. *See* RTE Group, Real Estate FAQs, http://www.rtegroup.com/real/faq.html.[12] In particular, public buildings owned by local communities may often be particularly desirable sites for antenna sites and other facilities. Consequently, under the factors identified in *Connolly v. Pension Benefit Guar.*, 475 U.S. 211, 224 (1986), any forced access proposal would effect a taking.

### C. Expanding the Scope of an Easement or Other Access Grant Beyond Its Original Terms to Permit the Placement of Additional Physical Facilities Would Constitute a *Per Se* Taking.

A utility's rights to occupy third-party property are limited by the terms of the grant. Such terms are determined in accordance with state property law.[13] Furthermore, the nature of a utility's access right in each particular instance is critical to this determination. If the utility only holds a license, as it typically would, the utility has no real property right: it merely has the right to attach its facilities to the underlying property.[14] Therefore, if the Commission were to attempt to expand the scope of a license, it would be essentially be granting an additional right to place physical facilities on the property – the very definition of a *per se* taking.

---

[11] Such a rule violates the principles underpinning the Fifth Amendment not only as a *per se* physical taking, but as a regulatory taking as well. *See* Real Access Alliance Comments, Exhibit E at pp.30-34.

[12] It should be noted that, where the building owners are local governments, such revenues may actually reduce taxes, by providing alternate, market-based sources of revenue.

[13] *See* Real Access Alliance Comments, Exhibit F at I.

Even if the utility held an easement or real property interest other than a license, there would be a taking in many instances. The only instances in which there may not be a taking in such a case are if the terms of the access right were broad enough to include additional users either by the express terms of the grant, or as interpreted under state law. The Commission's action would either expand the utility's property right by taking an additional piece of the owner's property, or it would shrink – and therefore take – the utility's property interest by giving it a share of it to the provider.[15] Therefore, even if Section 224 did apply to building access rights, an attempt to broaden the scope of an existing access right to accommodate an additional user's facilities would violate the Fifth Amendment.[16]

In most cases, therefore, the NPRM's Section 224 proposal would constitute a taking. In all cases, it would raise complex questions of state law regarding the nature of the access right. These are matters that fall outside the Commission's expertise and that it is not empowered to resolve.

### D. Congress Has Not Expressly Authorized The FCC To Take Property For This Purpose.

Even if the Commission had jurisdiction over building owners, and even if the Commission could require nondiscriminatory access under the Fifth Amendment, the Commission does not have the express authority required by *Bell Atlantic, supra*, to take private property. The D.C. Circuit made clear in *Bell Atlantic* that Congress has not conferred

---

[14] *See* Real Access Alliance Comments, Exhibit F at IIA.3.

[15] *See* Real Access Alliance Comments, Exhibit E at 26-28

the power of eminent domain on either the Commission or entities under its jurisdiction. Without an express statutory authorization, the Commission cannot effect a taking.

### E. Congress Did Not Give the Commission Implied Authority to Expose the Government to Fiscal Liability in the Court of Federal Claims.

In the absence of explicit statutory authority to take private property, the Commission cannot cure its lack of authority by relying upon on implied authority. The courts have long interpreted statutes narrowly in a manner that prohibits federal officers and personnel from exposing the federal government under the Tucker Act, 28 U.S.C. § 1491(a), to fiscal liability not contemplated or authorized by Congress. Article I, Sections 8 and 9, of the Constitution assigns to Congress exclusive control over appropriations. Thus, courts have required a clear expression of intent by Congress to obligate the Government for claims which require an appropriation of money, such as an award of just compensation in a taking of private property for public use as required under the Fifth Amendment. Such an intent is lacking for the takings contemplated by the NPRM.

The legislative history of Section 621(a)(2) of the 1984 Cable Act, 47 U.S.C. § 541(a)(2), allowing cable operators to use – upon payment of defined compensation – compatible utility easements across private property, shows that Congress had not intended to give the Commission power to mandate access to multi-unit buildings generally. In fact, Congress specifically took the contrary position. In 1984 the House deleted from H.R. 4103, as reported, the section of the cable bill that would have directed the Commission to

---

[16] As noted above, it would also exceed the Commission's jurisdiction. Sen. Rep. No. 580, 95th Cong., 1st Sess. (1977) at 16.